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DEPARTMENT OF LABOR

Wage and Hour Division

29 CFR Part 779

RIN 1235-AA32

Partial Lists of Establishments that Lack or May Have a “Retail Concept” under the Fair Labor Standards Act

AGENCY: Wage and Hour Division, Department of Labor.

ACTION: Final rule; withdrawal.

SUMMARY: Section 7(i) of the Fair Labor Standards Act (FLSA or Act) provides an exemption from the Act’s overtime compensation requirement for certain commissioned employees employed by a retail or service establishment. In this final rule, the Department of Labor (Department) withdraws the “partial list of establishments” that it previously viewed as having “no retail concept” and categorically unable to qualify as retail or service establishments eligible to claim the section 7(i) exemption; and the “partial list of establishments” that, in its view, “may be recognized as retail” for purposes of the exemption. Removing these lists promotes consistent treatment when evaluating section 7(i) exemption claims by treating all establishments equally under the same standards and permits the reevaluation of an industry’s retail nature as developments progress over time. This withdrawal will also reduce confusion, as the list of establishments that “may be recognized as retail” did not necessarily affect the analysis as to whether any particular establishment was, in fact, retail.

DATES: This rule is effective[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Amy DeBisschop, Director, Division of Regulations, Legislation, and Interpretation, Wage and Hour, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue, NW, Washington, DC 20210, telephone: (202) 693-0406 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION: Because part 779 is an interpretive rule, the provision in the Administrative Procedure Act (APA) requiring publication of a notice of proposed rulemaking does not apply. *See* 5 U.S.C. 553(b). Publication of this document constitutes a final action under the APA.

This rule is intended to promote consistent treatment across all industries and reduce confusion when determining eligibility for claiming the section 7(i) exemption. This rule does not impose any new requirements on employers or require any affirmative measures for regulated entities to come into compliance.

Pursuant to the Congressional Review Act, 5 U.S.C. 801 *et seq.*, the Office of Information and Regulatory Affairs (OIRA) designated this rule as not a “major rule,” as defined by 5 U.S.C. 804(2). OIRA has also determined that this final rule is not a “significant regulatory action” under Executive Order 12866, section 3(f), and has therefore waived its review. Finally, this final rule is not an EO 13771 regulatory action because it has been determined to be not significant under EO 12866.

I. Background

The FLSA generally requires covered employers to pay nonexempt employees overtime compensation for time worked in excess of 40 hours per workweek. *See* 29

U.S.C. 207(a). Section 7(i) of the Act was enacted to relieve employers in retail and service industries from the obligation of paying overtime compensation to certain employees paid primarily on the basis of commissions. In order for an employee to come within this exemption, “the regular rate of pay of such employee [must be] in excess of one and one-half times the [Act’s minimum wage],” and “more than half [of the employee’s] compensation for a representative period (not less than one month) [must represent] commissions on goods or services.” 29 U.S.C. 207(i). In addition, the employee must be employed by a retail or service establishment, which had been defined in section 13(a)(2) of the Act as “an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry.” 29 CFR 779.312 (quoting FLSA section 13(a)(2), Fair Labor Standards Amendments of 1949, Pub. L. No. 81-393, section 11, 63 Stat. 910, 917 (1949)).¹

¹ In 1989, Congress repealed section 13(a)(2)—which provided an exception for intrastate businesses from the FLSA’s minimum wage and overtime compensation requirements—and with it, the statutory definition of “retail or service establishment.” See Fair Labor Standards Act Amendments of 1989, Pub. L. 101-157, section 3, 103 Stat. 938, 939 (1989)). However, because “retail or service establishment” was defined in section 13(a)(2) of the Act when the section 7(i) exemption was added to the Act in 1961 and because “the legislative history of the 1961 amendments to the Act [indicated] that no different meaning was intended by the term ‘retail or service establishment’ from that already established by the Act’s definition,” the Department continues to use the repealed section 13(a)(2) definition of “retail or service establishment” to determine whether an employer qualifies as a “retail or service establishment” for purposes of the section 7(i) exemption. See 29 CFR 779.312 (citing legislative history) & § 779.411; WHD Opinion Letter FLSA2005-44, 2005 WL 3308615 (Oct. 24, 2005); WHD Opinion Letter FLSA2003-1, 2003 WL 23374597 (Mar. 17, 2003); see also *Gieg v. DDR, Inc.*, 407 F.3d 1038, 1047 (9th Cir. 2005) (agreeing that repealed section 13(a)(2)’s definition of “retail or service establishment” applies to the section 7(i) exemption); *Reich v. Delcorp, Inc.*, 3 F.3d 1181, 1183 (8th Cir. 1993) (same). But see *Alvarado v. Corp. Cleaning Servs., Inc.*, 782 F.3d 365, 369-71 (7th Cir. 2015) (rejecting the legislative history cited in the Department’s regulations and refusing to apply repealed section 13(a)(2)’s definition of

The Department has interpreted “retail or service establishment” as requiring the establishment to have a “retail concept.” 29 CFR 779.316. Such an establishment typically “sells goods or services to the general public,” “serves the everyday needs of the community,” “is at the very end of the stream of distribution,” disposes its products and skills “in small quantities,” and “does not take part in the manufacturing process.” *Id.* at § 779.318(a).

In 1961, the Department introduced in part 779, without notice-and-comment because it was an interpretive rule, a lengthy but non-exhaustive list of 89 types of establishments that it viewed as lacking a “retail concept.” *See* 26 FR 8333, 8355 (Sept. 2, 1961) (introducing 29 CFR 779.317). In 1970, the Department amended § 779.317, again without notice-and-comment because it was an interpretive rule, to add to the list another 45 establishments that it viewed as lacking a “retail concept.” *See* 35 FR 5856, 5881-82 (Apr. 9, 1970). Section 779.317 was not amended further.

Section 779.317’s non-retail list included establishments in various industries such as dry cleaners, tax preparers, laundries, roofing companies, travel agencies, blue printing and photostating establishments, stamp and coupon redemption stores, and telegraph companies. The Department’s view was that the establishments on the list could not qualify as retail or service establishments eligible to claim the section 7(i) exemption. Although some of the establishments on the list included citations to

“retail or service establishment” to the section 7(i) exemption because that exemption has a “very different purpose” than the provision in the Act for which the definition was initially included).

authorities,² in most cases § 779.317 did not provide any explanation for why a particular establishment categorically lacked a retail concept.

The same 1961 interpretive rule that introduced § 779.317 also included in part 779 a separate non-exhaustive list of 77 types of establishments that “may be recognized as retail.” *See* 26 FR 8333, 8356 (Sept. 2, 1961) (introducing 29 CFR 779.320). The Department amended § 779.320 in 1971, again without notice and comment because it was an interpretive rule, to remove “valet shops” from the list. *See* 36 FR 14466 (Aug. 6, 1971). Section 779.320 was not amended further.

The “may be” retail list included establishment in industries such as coal yards, fur repair and storage shops, household refrigerator service and repair shops, masseur establishments, piano tuning establishments, reducing establishments, scalp-treatment establishments, and taxidermists. Section 779.320 provided no explanation why any of the listed industries were included.

II. Explanations for Withdrawal of Section 779.317

The Department hereby withdraws the regulatory provision found at 29 CFR 779.317, which lists specific types of establishments that, in the Department’s view, lacked a retail concept and were therefore ineligible to claim the section 7(i) exemption. Establishments which had been listed as lacking a retail concept may now assert under part 779 that they have a retail concept and may be able to qualify as retail or service establishments. The Department will now apply its interpretations set forth in § 779.318

² Some of the authorities cited have subsequently been called into question. For instance, § 779.317 cited *Schmidt v. Peoples Telephone Union of Maryville, Mo.*, 138 F.2d 13 (8th Cir. 1943) as authority for including telephone companies on the list. More recently, a district court noted that *Schmidt* and the list generally “do not take into account changes in the size of and technologies in the current retail economy.” *In re: DirecTech Sw., Inc.*, No. 08-1984, 2009 WL 10663104, at *9 (E.D. La. Nov. 19, 2009).

and elsewhere in part 779 to determine whether establishments previously listed in § 779.317 have a retail concept and satisfy the additional criteria necessary to qualify as retail or service establishments.³ Accordingly, the Department will apply one analysis—the same analysis—to all establishments, thus promoting consistent treatment for purposes of the section 7(i) exemption.

Moreover, the generally applicable analysis set forth in § 779.318 and elsewhere in part 779 is better suited to account for developments in industries over time regarding whether they are retail or not. For example, an industry may gain or lose retail characteristics over time as the economy develops and modernizes, or for other reasons. A static list of establishments that absolutely lack a retail concept cannot account for such developments or modernization, which could have caused confusion for establishments as they tried to assess the applicability and impact of the list. The generally applicable analysis set forth in § 779.318 and elsewhere in part 779 better addresses each particular establishment's retail nature or lack thereof and is unlikely to result in similar confusion.

Statements of courts that have questioned the reasoning behind the list in § 779.317 inform the Department's action. For instance, the Seventh Circuit recently described the list as an “incomplete, arbitrary, and essentially mindless catalog.” *Alvarado*, 782 F.3d at 371. The Ninth Circuit, in turn, said that “the list does not appear to flow from any cohesive criteria for retail and non-retail establishments” and declined to defer to the list with respect to schools. *Martin v. The Refrigeration Sch., Inc.*, 968 F.2d 3, 7 n.2 (9th Cir. 1992); *see also, e.g., Wells v. TaxMasters, Inc.*, No. 4:10-CV-2373, 2012 WL 4214712, at *6 (S.D. Tex. Sept. 18, 2012) (concluding that the listing of “tax

³ *See, e.g.*, 29 CFR 779.316, 319, 321 (further discussing retail concept) & 779.322-336 (discussing additional criteria to qualify as a retail or service establishment).

services” in § 779.317 was not determinative and finding that a tax-consulting and tax-preparation services company met part 779’s criteria for a retail or service establishment); *Reich v. Cruises Only, Inc.*, No. 95-660-CIV-ORL-19, 1997 WL 1507504, at *4-5 (M.D. Fla. June 5, 1997) (concluding that “excluding a travel agency from those establishments possessing a retail concept appear[s] to be arbitrary and without any rational basis explained in the regulations,” especially considering that travel agencies better fit the criteria in § 779.318 than some of the establishments listed in § 779.317). *But see, e.g., Brennan v. Great Am. Discount & Credit Co., Inc.*, 477 F.2d 292, 296-97 (5th Cir. 1973) (finding “the Administrator has considered all relevant issues” in including employment agencies in § 779.317’s list and relying on the regulations to rule that employment agencies lacked the necessary retail concept to qualify as retail or service establishments); *Burden v. SelectQuote Ins. Servs.*, 848 F. Supp.2d 1075, 1084-86 (N.D. Cal. 2012) (finding § 779.317 to be “persuasive” and ruling that defendant fell “within the brokerage industry that section 779.317 finds to lack the requisite retail concept to qualify for an exemption from the FLSA’s overtime requirements”); *McKenzie v. Lindstrom Air Conditioning, Inc.*, No. 08-CV-61378, 2009 WL 10667579, at *3 (S.D. Fla. Sept. 3, 2009) (noting “the specific carveout for air-conditioning contractors from the retail concept” in § 779.317 and deciding to “follow the guidance provided by this DOL interpretation” to conclude that they do not qualify as retail or service establishments).

III. Explanations for Withdrawal of Section 779.320

The Department further withdraws the regulatory provision found at 29 CFR 779.320, which listed types of establishments that, in the Department’s view, “may be recognized as retail” and therefore may have been eligible to claim the section 7(i)

exemption. Part 779 explains that “the mere fact that an establishment is of a type noted in § 779.320 does not mean that any particular sales of such establishment are within the retail concept.” 29 CFR 779.321(a). Rather, an establishment on the “may be” retail list was subject to the same retail concept requirements as an establishment not on the list. Thus, establishments on the “may be” retail list will still be found to lack a retail concept if they fail to satisfy the Department’s criteria for retail concept set forth in § 779.318. *See, e.g., Brennan v. Parnham*, 366 F. Supp. 1014, 1023 (W.D. Pa. 1973) (opining that, even if defendant operated “automobile repair garages [as listed] in Section 779.320...he has still failed to meet the second requirement that the particular services must be recognized as retail services”). And establishments not on the “may be” retail list may still be recognized as retail if they satisfy those criteria. *See, e.g., Alvarado v. Corp. Cleaning Serv., Inc.*, 719 F. Supp. 2d 935, 944 n.9 (N.D. Ill. 2010) (holding that window washing business met criteria of a retail establishment set forth at § 779.318(a) even though “[w]indow washing service providers do not appear on [the § 779.320] list”). As such, § 779.320 did not necessarily impact the analysis as to whether any particular establishment was retail.

In addition, and as with § 779.317’s non-retail list, courts have questioned the reasoning behind § 779.320’s “may be” retail list. In *Martin*, for instance, the Ninth Circuit stated that simultaneously listing “dentists, doctors, and lawyer offices” as non-retail in § 779.317 and “barber shops,” “scalp-treatment establishments,” and other establishments as possibly retail in § 779.320 was inconsistent with the Department’s own criteria in § 779.318 that a retail establishment should provide for “everyday needs of the community” and “the comfort and convenience of [the general] public in the

course of its daily living.” 968 F.2d at 7 n.2 (“A community’s tonsorial services are hardly more integral to its daily routine than its medical or dental ones.”). Similarly, the court in *Cruises Only* found it was “arbitrary and without any rational basis” to list travel agencies as non-retail in § 779.317 in part because—in that case—they serve a community’s everyday needs more than at least some industries that may “be recognized as retail” in § 779.320, such as taxidermists or crematoriums. 1997 WL 1507504, at *4-5. In short, “there appear to be ‘no generating principles’ or ‘cohesive criteria’ underlying the distinction between the businesses that are considered retail establishments as listed in § 779.320 and those which are not as listed in § 779.317.” *Haskins v. VIP Wireless LLC* 300, No. 09-754, 2010 WL 3938255, at *3 (W.D. Pa. Oct. 5, 2010) (quoting *Martin*, 968 F.2d at 7 n.2). *But see, e.g., Klinedinst v. Swift Investments, Inc.*, 260 F.3d 1251, 1256 n.5 (11th Cir. 2001) (citing § 779.320 for the proposition that “[a]utomobile repair shops have been explicitly recognized as retail establishments”); *Gilreath v. Daniel Funeral Home, Inc.*, 421 F.2d 504, 508 (8th Cir. 1970) (noting that plaintiffs conceded that a funeral home was a retail or service establishment because, in part, the Department had recognized it as one in § 779.320).

As with establishments previously listed in § 779.317, the Department will apply its interpretations set forth in § 779.318 and elsewhere in part 779 to determine whether establishments previously listed in § 779.320 have a retail concept and satisfy the additional criteria necessary to qualify as retail or service establishments. All establishments may be recognized as retail if they satisfy these criteria, not just those previously listed in § 779.320. And the Department will promote consistent treatment for

purposes of the section 7(i) exemption by applying the same retail concept analysis to all establishments.

For the foregoing reasons, the Department concludes that withdrawal from part 779 of the “partial list of establishments” that it viewed as having “no retail concept” and the separate “partial list of establishments” that, in its view, “may be recognized as retail” is warranted and hereby withdraws §§ 779.317 and 779.320.

Nothing in this action should be construed to suggest that any particular type of establishment previously listed by the Department is, or is not, a retail establishment.

IV. Administrative Procedure Act

The Department concludes that notice-and-comment rulemaking is not required to withdraw §§ 779.317 and 779.320 from part 779. The APA provides that its general notice-and-comment requirements do not apply to “interpretative rules.” 5 U.S.C. 553(b); *see also Perez v. Mortgage Bankers Ass’n*, 575 U.S. 92, 101 (2015) (evaluating subregulatory guidance that was an “interpretive rule” and explaining that “[b]ecause an agency is not required [by the APA] to use notice-and-comment procedures to issue an initial interpretive rule, it is also not required to use those procedures when it amends or repeals that interpretive rule”). Because the regulations in part 779 are interpretive rules, the Department declined to engage in notice-and-comment rulemaking when it initially promulgated the §§ 779.317 and 779.320 lists in 1961, *see* 26 FR 8333, and when it later amended them in 1970 and 1971, *see* 35 FR 5856; 36 FR 14466. Accordingly, the Department is not required to engage in notice-and-comment rulemaking to withdraw the lists today, and it declines to do so as it has declined in the past.

Similarly, the APA does not require agencies to delay the effective date of “interpretative rules” following publication in the Federal Register. 5 U.S.C. 553(d)(2). Because the regulations in part 779 are interpretive rules, the Department declined to delay the effective date when it initially promulgated the §§ 779.317 and 779.320 lists in 1961, *see* 26 FR 8333, and when it later amended them in 1970 and 1971, *see* 35 FR 5856; 36 FR 14466. Consistent with this prior practice, the Department declines to delay the effective date of its withdrawal of §§ 779.317 and 779.320; the withdrawal takes effect immediately.

List of Subjects

29 CFR Part 779

Reporting and recordkeeping requirements, Wages.

Dated: May 8, 2020.

Cheryl M. Stanton,
Administrator.

For the reasons set forth above, the Department of Labor amends Title 29, Part 779 of the Code of Federal Regulations as follows:

**PART 779—THE FAIR LABOR STANDARDS ACT AS APPLIED TO RETAILERS
OF GOODS OR SERVICES**

1. The authority citation for part 779 continues to read as follows:

Authority: Secs. 1-19, 52 Stat. 1060, as amended; 75 Stat. 65; Sec. 29(B), Pub. L. 93-259, 88 Stat 55; 29 U.S.C. 201-219.

§ 779.317 [Removed and Reserved]

2. Remove and reserve § 779.317.

§ 779.320 [Removed and Reserved]

3. Remove and reserve § 779.320.

[FR Doc. 2020-10250 Filed: 5/18/2020 8:45 am; Publication Date: 5/19/2020]